Supreme Court, U. S.
FILED
APR 19 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1460

VEGAS VIC, INC.; d/b/a PIONEER CLUB,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORMAN H. KIRSHMAN
CHARLES H. GOLDSTEIN
JEFFREY C. FREEDMAN
Suite 2400
1801 Century Park East
Los Angeles, California 90067
(213) 553-8660

Attorneys for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. _____

VEGAS VIC, INC., d/b/a
PIONEER CLUB,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORMAN H. KIRSHMAN
CHARLES H. GOLDSTEIN
JEFFREY C. FREEDMAN
Suite 2400
1801 Century Park East
Los Angeles, California 90067
(213) 553-8660

Attorneys for Petitioner

TOPICAL INDEX

	Page
Table of Authorities	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	3
STATEMENT OF FACTS	7
THE BOARD'S FINDINGS OF FACT	7
THE DECISION OF THE COURT OF APPEALS	12
REASONS FOR GRANTING THE WRIT	13
THERE IS DISAGREEMENT BY THE SECOND, FIFTH, SEVENTH AND NINTH CIRCUITS WITH THE SIXTH CIRCUIT IN RESPECT TO THE QUANTUM OF EVIDENCE REQUIRED TO REBUT THE PRESUMPTION OF CONTINUED MAJORITY STATUS IN A WITHDRAWAL OF RECOGNITION CASE.	14

THE CLEAR, COGENT AND CONVINCING TEST IMPOSED BY THE COURT OF APPEALS EXCEEDS THE STANDARD REQUIRED BY BOARD PRECEDENT. 15

THE COURT OF APPEALS IS NOT AUTHORIZED BY SECTION 10(e) OF THE ACT TO IMPOSE A HEAVIER BURDEN OF PROOF THAN THAT REQUIRED BY THE BOARD. 17

THE JUDGMENT OF THE COURT OF APPEALS AS INTERPRETED BY THE REGIONAL DIRECTOR HAS ENLARGED THE SCOPE OF THE BOARD'S ORDER. 19

CONCLUSION 22

APPENDICES

TABLE OF AUTHORITIES

Cases	Page
Automated Business Systems v. NLRB, 497 F.2d 262 (6th Cir. 1974)	14, 15
Celanese Corporation of America, 95 NLRB 664 (1951)	15, 16
Ingress-Plastene, Inc. v. NLRB, 430 F.2d 542 (7th Cir. 1970)	16
NLRB v. Brandman Iron Co., 368 U.S. 399 (1962)	20
NLRB v. Food Store Employees Union Local 347 417 U.S. 1 (1974)	20
NLRB v. Las Vegas Sand & Gravel Corp., 368 U.S. 400 (1962)	20
NLRB v. Local 476, Plumbing and Pipefitting, 368 U.S. 401 (1962)	20
NLRB v. Ochoa Fertilizer Corporation, 368 U.S. 318 (1961)	20
NLRB v. Tex-O-Kan Flour Mills Co., 122 F.2d 433 (5th Cir. 1941)	17
NLRB v. Tragniew, 470 F.2d 669 (9th Cir. 1972)	12, 13, 16

NLRB v. Vegas Vic, Inc.,
546 F.2d 828 (9th Cir. 1977) 2, 16

NLRB v. Walton Manufacturing Company,
369 U.S. 404 (1962) 17, 18

Oilfield Maintenance Co., Inc.,
142 NLRB 1384 (1963) 16

Orion Corporation v. NLRB,
515 F.2d 81 (7th Cir. 1975) 12, 13, 16

Ref-Chem Company v. NLRB,
418 F.2d 127 (5th Cir. 1969) 13, 16

Retired Persons Pharmacy v. NLRB,
519 F.2d 486 (2nd Cir. 1975) 13, 16

Shamrock Dairy, Inc.,
119 NLRB 998 (1957) 16

South Prairie Construction Co. v.
Local No. 627, International Union of
Operating Engineers,
___ U.S. ___, 96 S.Ct. 1842 (1976) 21

Stoner Rubber Co.,
123 NLRB 1440 (1959) 16

Terrell Machine Co.,
173 NLRB 1480 (1969) 16

Statutes

28 U.S.C.,
Section 1254(1) 2

29 U.S.C.
Section 160(e) 3, 16

Section 8(a)(1) 11

Sections 8(a)(1), (3) and (5) 9

Sections 8(a)(5) and (1) 11

Section 10(e) 3

29 U.S.C.
61 Stat. 136, 73 Stat. 519
Sections 151, et seq. 3

29 U.S.C.
Section 158(a)(1), (3) and (5) 9, 10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

VEGAS VIC, INC., d/b/a
PIONEER CLUB,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Vegas Vic, Inc., d/b/a Pioneer Club ("Petitioner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals enforcing a Decision and Order of the National Labor Relations Board (the "Board"), as modified, is officially reported at 546 F. 2d 828 (9th Cir., 1977). (Appendix A). The Decision and Order of the Board which includes the recommended Decision and Order of the Administrative Law Judge (ALJ) is reported at 213 NLRB 841 (1974). (Appendix B).

JURISDICTION

The judgment of the Court of Appeals was originally entered on November 23, 1976. (Appendix C). Petition for Rehearing En Banc was denied on January 28, 1977. (Appendix D). In conjunction with its denial of the Petition for Rehearing, the Court of Appeals amended the slip opinion by deletion and substitution. On February 28, 1977, the Court of Appeals filed and entered judgment. (Appendix E). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether in withdrawal of recognition cases, the presumption of continued majority status enjoyed by an incumbent union can only be overcome by clear, cogent and convincing evidence.

2. Whether Section 10(e) of the Act (29 U.S.C., Section 160(e)) authorizes the Court of Appeals in a withdrawal of recognition case to require a heavier burden of proof on the part of the employer than that required by the Board, in order to rebut the presumption of continued majority status.

3. Whether upon application by the Board for enforcement of an order the Court of Appeals has the authority to grant relief beyond that sought by the application and contrary to the Decision and Order of the Board.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sections 151, et seq.) are as follows:

"Section 8.

(a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this title.

"Section 10.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon the filing of such petition, the

court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of

the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

STATEMENT OF FACTS

A. THE BOARD'S FINDINGS OF FACT.

For purposes of this Petition, only those findings which relate to the questions presented will be set forth.

Petitioner is located in Las Vegas, Nevada, and operates a gambling establishment commonly referred to as a "slot house". (Appendix B-9). The Local Joint Executive Board of Las Vegas Hotel and Restaurant Employees and Bartenders Union, AFL-CIO (the "Union") is composed of Bartenders Union, Local 165 and Culinary Workers Union, Local 226, and negotiates collective bargaining agreements on behalf of the two Locals.

In 1967, ownership of the Club changed upon acquisition by the principals, who presently are and at all times material to this proceeding were its owners and operators. Shortly thereafter, the Club which had been operated as a gambling casino, was converted to a slot house. (Appendix B-10).

In 1970, a new collective bargaining agreement was negotiated which unlike its predecessor contained no job classifications covering booth cashiers ("cashiers") or change girls. (Appendix B-11.) Although, at the outset, health and

welfare contributions were made for only one cashier on each of the three shifts and for none of the change girls, by mid-1971 and through June 1973, Petitioner was contributing to the Union's health and welfare fund on behalf of all employees, including cashiers and change girls. (Appendix B-12-13).

In 1972, Petitioner received complaints from employees in respect to the administration of health insurance claims under the Union contract. (Appendix B-18, 19).

During the life of the 1970-73 labor agreement, Petitioner secured bartenders and waitresses through the Union's exclusive hiring hall, but did not use the hiring hall to secure cashiers and change girls. Petitioner hired cashiers and change girls on a direct basis, despite the fact that the labor agreement made no distinction among classifications in respect to required use of the hiring hall to obtain employees. (Appendix B-17).

The Board found that cashiers and change girls were covered by the labor agreement by virtue of a 1968 settlement agreement entered into between the Union and employers signatory to the casino agreement. (Appendix B-16).

Between July 1, 1970 and July 1, 1973, cashiers and change girls brought no grievances to the Union and none were filed by the Union on behalf of employees in those classifications. (Appendix B-17, 18).

The 1970-73 agreement terminated July 1, 1973, following notification on April 18, 1973 by the Union and a response on April 26, 1973 by Petitioner. (Appendix B-13). Following the April exchange of letters, there were no further communications between the parties until July 18, 1973 when the Union requested a meeting to negotiate a new contract. (Appendix B-14).

Petitioner met with the Union briefly on July 25, 1973 at which time Petitioner's representative told the Union that it wanted an election. (Appendix B-14).

On or about August 2, 1973, a representative of the Employer was presented with a petition signed by a majority of the employees declaring their dissatisfaction with the Union (Appendix B-19).

On August 6, 1973, the Union filed unfair labor practice charges. On August 16, 1973, Petitioner filed a petition for a representation election. (Appendix B-14).

The cashiers and change girls, considered in the context of an overall bargaining unit, constituted a majority. The Board found that Petitioner believed that the cashiers and change girls in its employ were not members of the Union. (Appendix B-16, n.4).

In addition to the foregoing findings of fact, the Board found that after the expiration of the 1970-1973 contract, Petitioner violated Sections 8(a)(1), (3) and (5) of the Act (29 U.S.C., Sections 158(a)(1), (3) and (5) by reason of coercive

statements, a discriminatory discharge and a unilateral change in health insurance coverage from the Union plan to a private carrier.

The findings by the Board of independent violations of the Act do not relate to or detract from other findings which form the basis for Petitioner's decision to withdraw recognition. 1/

1/

(a) The lack of specific reference by classification in the labor agreement to cashiers or change girls.

(b) The failure by the Union to require Petitioner to use the hiring hall in respect to cashiers and change girls despite Petitioner's use of the hall for other classifications.

(c) The lack of any grievances filed by or on behalf of cashiers or change girls.

(d) Receipt by Petitioner of complaints by employees in respect to the Union administered health insurance plan.

(e) Petitioner's belief that none of the cashiers or change girls, which group constituted a majority of the employees in the bargaining unit, were members of the Union.

(f) The failure by the Union to request negotiations prior to the expiration of the labor agreement.

With one exception, which is of particular significance to this Petition, the Board adopted the findings, conclusions and recommended Order of the Administrative Law Judge. (Appendix B-2, 3). The one exception is that the ALJ found that Petitioner violated Sections 8(a)(5) and (1) of the Act by changing its method of operation from a sit down bar to a service bar without consulting the Union. The ALJ's order in Paragraph 2(c) thereof would require that Petitioner make the bartenders, who were employed during the critical period, whole for any loss of tips they would have received had Petitioner continued to operate its bar as a sitdown bar. The Board disagreed and modified the recommended Decision and Order accordingly. (Appendix B-4).

The Board's Order, in essence, adopts the Order recommended by the ALJ, except in respect to the make whole remedy for bartenders. The thrust of the Order, which was the subject of the Application filed with the Court of Appeals, is a general bargaining order, with cease and desist provisions in respect to unilateral changes and conduct violative of Section 8(a)(1) of the Act; plus a reinstatement and make whole remedy in respect to an employee the Board determined to have deen discriminatorily discharged.

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals affirmed the Decision and enforced the Order of the Board.

The initial opinion issued by the Court of Appeals declared,

> "In a withdrawal of recognition case, the employer bears the burden of proving the union's loss of majority and the presumption of majority must be rebutted by clear, cogent and convincing evidence. NLRB v. Tragniew, 470 F.2d 669, 674-75 (9th Cir. 1972). This the employer failed to do." (Appendix C).

In apparent response to the Petition for Rehearing which questioned the validity of the "clear, cogent and convincing" evidence requirement, the Court of Appeals amended the "slip opinion" by deleting the direct reference to that requirement along with the citation to NLRB v. Tragniew, supra. Although the Court failed to expressly enunciate or describe the quantum of proof it would require of an employer to successfully rebut the presumption enjoyed by a union of continued majority status and thereby shift the burden of proof to the General Counsel, citation is made to Orion Corporation v. NLRB, 515 F. 2d 81 (7th Cir. 1975) and Retired Persons

Pharmacy v. NLRB, 519 F.2d 486, 490 (2nd Cir. 1975). Both cases impose the clear, cogent and convincing evidence requirement.

Despite what appears to be a reluctance on the part of the Court below to clearly state, that in its review of the Record, a burden of proof was imposed that is higher than the preponderance of the evidence standard which is applied to the General Counsel as a prerequisite to establishing his case, there can be little doubt that the Court did in fact apply the clear, cogent and convincing standard. The initial reference to Tragniew and the continued reliance upon Orion and Retired Persons Pharmacy militates in favor of that conclusion. 2/

2/ Ref-Chem Company v. NLRB, 418 F.2d 127 (5th Cir. 1969) is cited by the Court in Tragniew in support of the clear, cogent and convincing requirement.

REASONS FOR GRANTING THE WRIT

THERE IS DISAGREEMENT BY THE SECOND, FIFTH, SEVENTH AND NINTH CIRCUITS WITH THE SIXTH CIRCUIT IN RESPECT TO THE QUANTUM OF EVIDENCE REQUIRED TO REBUT THE PRESUMPTION OF CONTINUED MAJORITY STATUS IN A WITHDRAWAL OF RECOGNITION CASE.

As noted above, the Courts of Appeals for the Second, Fifth, Seventh and Ninth Circuits require that an employer in a withdrawal of recognition case present clear, cogent and convincing evidence of either loss of a union's majority or good faith doubt of majority status in order to overcome the presumption of continued majority. The Sixth Circuit disagrees. In Automated Business Systems v. NLRB, 497 F.2d 262 (6th Cir. 1974), the Court said,

> "We find that once sufficient evidence has been presented to cast a doubt on the continued majority status, the burden shifts to the General Counsel 'to prove that, on the

critical date, the union in fact represented a majority of the employees.' (citations omitted). Thus, evidence sufficient to justify the company's withdrawal of bargaining is sufficient to shift the burden of proof to the General Counsel." At page 270.

THE CLEAR, COGENT AND CONVINCING TEST IMPOSED BY THE COURT OF APPEALS EXCEEDS THE STANDARD REQUIRED BY BOARD PRECEDENT.

Petitioner has been unable to find any case decided by the Board in which the stringent requirement of clear, cogent and convincing evidence has been imposed in a withdrawal of recognition case.

Celanese Corporation of America, 95 NLRB 664 (1951) sets forth the controlling legal principles in such cases. There, the Board made no reference to a standard of proof other than to use the term "competent evidence." In point of fact, analysis of the Board's reasoning in Celanese leads to the conclusion that the evidence which the Board accepted as sufficient to support the employer's assertion of good faith doubt was largely subjective. See Automated Business Systems, Inc. v. NLRB, 497 F.2d 262, 271 n.7.

The leading Board cases use language such as "competent evidence," "sufficient evidence," "reasonable grounds," and "reasonable basis." Celanese Corporation of America, 95 NLRB 664 (1951); Stoner Rubber Co., 123 NLRB 1440 (1959); Terrell Machine Co., 173 NLRB 1480 (1969). Cf. Ingress-Plastene, Inc. v. NLRB 430 F.2d 542, (7th Cir. 1970).

Ref-Chem Company v. NLRB, supra, relied upon by the Court in Tragniew, cites Oilfield Maintenance Co., Inc., 142 NLRB 1384 (1963) and Shamrock Dairy, Inc., 119 NLRB 998 (1957) as authority for the clear, cogent and convincing evidence requirement. Neither case makes reference to such requirement.

It is thus clear that the imposition by the Court of Appeals of the more rigid burden of proof has no basis in Board precedent, but is a rule fashioned by the Court of Appeals for the Fifth Circuit in Ref-Chem and followed without careful analysis by the Courts in Tragniew, Orion, Retired Persons Pharmacy and Vegas Vic.

THE COURT OF APPEALS IS NOT AUTHORIZED BY SECTION 10(e) OF THE ACT TO IMPOSE A HEAVIER BURDEN OF PROOF THAN THAT REQUIRED BY THE BOARD.

In NLRB v. Walton Manufacturing Company, 369 U.S. 404 (1962), this Court struck down a special rule fashioned by the Fifth Circuit in NLRB v. Tex-O-Kan Flour Mills Co., 122 F.2d 433 (5th Cir. 1941). The rule concerned the weight of evidence necessary to sustain Board orders for reinstatement with back pay in cases of discriminatory discharges and prescribed a heavier burden of proof in such cases than that necessary in cases not involving those remedial features. This Court, per curiam, said,

> "There is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases." 369 U.S. at page 407.

In Walton, the double standard had been applied by the Fifth Circuit to the detriment of the General Counsel. The special rule increased the General Counsel's burden of proof in such cases. In the case at bench, Petitioner seeks review of a special rule that forces an employer

to meet a presumption of majority status by clear, cogent and convincing evidence and yet permits the General Counsel to prove majority status, either by a preponderance of the evidence or by way of presumption where the rigid burden of proof is not met. Compounding the basic unfairness of the special rule is the fact that Board procedures permit no discovery and attempts at investigation by an employer into his employees' symphathies or feelings about a union constitute a violation of the Act.

The special "clear, cogent and convincing" rule has therefore created two categories of substantial evidence.

The question must then be asked: When the Court of Appeals found substantial evidence to support the Board's order herein, was that finding not clouded by its rejection of the "good faith doubt" defense in that Petitioner failed to satisfy the "special rule?"

Petitioner submits that is precisely what happened. Walton is therefore applicable and the "special rule" should be struck down.

THE JUDGMENT OF THE COURT OF APPEALS AS INTERPRETED BY THE REGIONAL DIRECTOR HAS ENLARGED THE SCOPE OF THE BOARD'S ORDER.

As noted heretofore, the Board rejected a finding by the ALJ that Petitioner violated the Act by converting its bar from a "sit down" to a "service" operation.

Neither the opinion nor the body of the judgment of the Court of Appeals makes direct reference to such conduct. Appendix A to the Judgment, however, contains a "make whole" remedy as well as the statement that,

> "Respondent violated Section 8(a)(5) and (1) of the Act by converting its sit down bar to a service bar..."

Appendix A to the Judgment is an extract from the remedy recommended by the ALJ. (See Appendix E). It is Petitioner's belief that the Court of Appeals intended to limit the incorporative effect of Appendix A to the portion dealing with make whole requirements for Michael Leone. However, the Regional Director who is charged with securing compliance with the Judgment, views the matter differently. By letter dated March 3, 1977, Regional Director Abraham Siegel includes a make whole demand in respect to the conversion from "sit down" to

"service" bar. (Appendix F). Petitioner must therefore assume that the Regional Director's position reflects that of the Board and is forced to seek relief accordingly.

It is well established that the Courts of Appeals cannot enlarge upon a Board Order and cannot act sua sponte in the matter of remedy.

> NLRB v. Food Store Employees Union, Local 347, 417 U.S. 1 (1974);
>
> NLRB v. Ochoa Fertilizer Corporation, 368 U.S. 318 (1961);
>
> NLRB v. Brandman Iron Co., 368 U.S. 399 (1962);
>
> NLRB v. Las Vegas Sand & Gravel Corp., 368 U.S. 400 (1962);
>
> NLRB v. Local 476, Plumbing and Pipefitting, 368 U.S. 401 (1962).

In Food Store Employees Union, Local 347, supra, the Court of Appeals enlarged upon an order of the Board and gave clear reasons for so doing. In reversing and remanding, this Court stated,

> "Thus, when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances,

remand to the agency for consideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course. Application of the general principle in this case best respects the congressional scheme investing the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy." [Emphasis added.]

The above rationale was recently followed by this Court in South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers, __ U.S. ___, 96 S.Ct. 1842 (1976).

In the case at bench, assuming the Regional Director's interpretation of the Judgment to be correct, the Court of Appeals has without comment or explanation modified the Board's Decision by reinstating a violation rejected by the Board and enlarged the Order of the Board.

The issue was not presented to the Court by either the Board or the Petitioner during the course of the appellate proceeding. Therefore, by enlargement of the Order, the Court of Appeals acted beyond the scope of authorized judicial review and has denied Petitioner due process.

CONCLUSION

The Opinion and Judgment of the Court of Appeals adds uncertainty to an area of the law already muddied by divergent views between the Second, Fifth, Seventh and Ninth Circuits on the one hand, and the Sixth Circuit on the other.

The situation in Petitioner's view is further aggravated by the incursion by those Circuits, in accord with the Court below, upon the broad discretion of the Board in formulating the rules by which litigants appearing before it must conduct themselves. The Board has not seen fit to enunciate a "clear, cogent and convincing" standard for withdrawal of recognition cases. Whether such a rule, if promulgated by the Board would be proper, is a matter for another case and another day. Absent such a requirement by the Board, is due process served by permitting appellate courts in the exercise of judicial review of Board proceedings to impose that standard as part of the analysis to determine whether substantial evidence supports a Board order? It is submitted that the answer to that question must be in the negative.

The obligation by employers to recognize and bargain with unions representing a majority of their employees in an appropriate unit is fundamental to the national labor policy. The presumption of continued majority comes into

play every day in cities all over the nation. To provide employees, labor and management with reasonable predictability in this area, the current state of uncertainty should be rectified. A decision which adds to the uncertainty, warrants review by this Court.

The matter of enlargement of the Board's Order, if indeed that was done by the Court of Appeals, cannot be countenanced by this Court. The law is clear. Grant of this Petition is necessary to correct a judgment contrary to the clear direction of this Court.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated at Los Angeles, California, this 15th Day of April, 1977.

Respectfully submitted,

NORMAN H. KIRSHMAN
CHARLES H. GOLDSTEIN
JEFFREY C. FREEDMAN

Attorneys for Petitioner

APPENDIX A

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

VEGAS VIC, INC. d/b/a Pioneer Club, Respondent.

No. 74-3278.

United States Court of Appeals, Ninth Circuit.

Nov. 23, 1976.

As Amended on Denial of Rehearing and Rehearing En Banc Feb. 2, 1977.

* * *

Before CARTER, WRIGHT and WALLACE, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

[1, 2] The Board's order, reported at 213 NLRB No. 116, should be enforced. It is well settled that there must be substantial evidence on the record as a whole to support the Board's findings and that the trial examiner has the responsibility of evaluating the credibility of the witnesses and the weight to be given their testimony. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951);

NLRB v. Tri-State Stores, Inc., 477 F.2d 204, 206 (9th Cir. 1972), cert. denied 414 U.S. 1130, 94 S.Ct. 868, 38 L.Ed.2d 754 (1974).

[3] Here substantial evidence on the record as a whole supports the Board's findings that the employer violated the Labor Relations Act by (1) insisting upon a representation election before bargaining with the union, (2) bargaining directly with employees, and (3) unilaterally instituting a new insurance plan.

[4] An incumbent union's majority status is presumed to continue after expiration of an employer-union agreement. Terrell Machine Co. v. NLRB, 427 F.2d 1088, 1090 (4th Cir.), cert. denied 398 U.S. 929, 90 S.Ct. 1821, 26 L.Ed.2d 91 (1970). To overcome the presumption, the employer must show that the union no longer had majority support or that his refusal to bargain was predicated upon a reasonably grounded good faith doubt of majority support. Id. at 1090.

In approaching the question of good faith doubt we note that the Board has adopted an objectice approach* and has recently stated: "[T]he standard of serious doubt as employed by the courts is no more or less than the standard the Board sets out when it states that 'reasonably based doubt' must be based on 'objective considerations'. . . ." Bartenders, Hotel, Motel and Restaurant Employers Bargaining

*See Wanda Petroleum, 217 NLRB no. 62 (April 11, 1975).

Ass'n, 213 NLRB No. 74, 87 LRRM 1194, 1197 (1974).

[5] In following the objective approach, however, we recognize that subjective intent may be considered insofar as it is discerned from objective evidence. As stated in Orion Corporation v. NLRB, 515 F.2d 81, 85 (7th Cir. 1975), "The 'good faith doubt' must satisy an objective test, although subjective evidence may be used to bolster the argument that such doubt existed at the relevant time."

Vegas Vic contends that it established that it entertained a bona fide doubt as to the union's majority status which should have been sufficient to shift the burden of proof to the general counsel for the Board to come forward with evidence to establish the union's continuing majority. The factors upon which it relies, however, are insufficient to convince us that the Board's conclusions are not supported by substantial evidence.

[6] The fact that 14 of 24 members of the bargaining unit were not members of the union does not mean that the union did not have their support. Terrell, 427 F.2d at 1090; Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 490 (2d Cir. 1975). Facts cited by the employer in defense of its withdrawal of recognition are either not supported by the record, refuted by its own actions and 25-year bargaining history, or are the type of "speculative and subjective" information specifically rejected in Orion Corp. v. NLRB, 515 F.2d 81, 85 (7th Cir. 1975).

The Board's order will be enforced.

APPENDIX B

Vegas Vic, Inc., d/b/a Pioneer Club and Local Joint Executive Board of Las Vegas, Hotel and Restaurant Employees & Bartenders International Union, AFL-CIO. Case 31-CA-3897

October 4, 1974

DECISION AND ORDER

By Chairman Miller and Members Jenkins and Penello

On May 6, 1974, Administrative Law Judge Stanley Gilbert issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative

---

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not

(cont. p. B-2)

Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found that Respondent violated Section 8(a)(5) of the Act by changing its method of operation from a "sit-down" bar to a "service" bar without consulting the Union. We do not agree. The Act does not require bargaining in advance over such changes in method of operation. Rather, the Act's intent was to leave business management decisions of this kind to the employer, but where such a decision has some adverse effect on the employees, they may grieve or request negotiations on the subject of what corrective action the employees desire in order to cure any inequity to the employees which may have resulted from the change. Since the change had an effect on the employees' earnings, because it apparently resulted in the employees' receiving less tips from customers, there was a duty to bargain, upon request, about the effects of the change; i.e., whether additional economic benefits should be provided to compensate the employees

---

[1] (cont. from p. B-1)

to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convnices us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

for the loss of tips which allegedly resulted from the change. But here no such request was ever made. Accordingly, we will dismiss this allegation of the complaint relating to the change in method of operation, and delete that portion of the remedial order relating thereto.

Conclusions of Law

We adopt the Conclusions of Law of the Administrative Law Judge except that we shall delete subsection (a) from paragraph 4 thereof, and reletter the remaining subsections of that paragraph accordingly.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, Vegas Nic, Inc., d/b/a Pioneer Club, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b) of the recommended Order:

"(b) Effecting changes in the insurance plan of employees in the above-described bargaining unit without prior consultation with the

Union."

2. Delete paragraph 2(c) from the recommended Order and reletter the subsequent paragraphs accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We will not refuse to bargain in good faith with the Local Joint Executive Board of Las Vegas, Hotel and Restaurant Employees & Bartenders International Union, AFL-CIO, as the collective-bargaining representative of the employees in the following bargaining unit:

> All employees, including bartenders, waitresses, change girls, cashiers, porters, and snack bar attendants, excluding office clerical employees, guards, and supervisors as defined in the Act.

We will not effect changes in the insurance plan of employees in the above-described bargaining unit without prior consultation with the aforesaid Union.

We will not bargain directly with employees with respect to their wages or terms and conditions

of their employment.

We will not discourage membership in the aforesaid Union by discriminating in regard to hire or tenure of employment or terms or conditions thereof.

We will not solicit employees to withdraw their membership from the aforesaid Union or threaten employees with loss of employment if they do not do so.

We will not condition receipt of health insurance benefits of employees on their withdrawal from membership in the aforesaid Union.

We will not threaten loss of bonuses paid to certain of our employees should they elect to have the aforesaid Union represent them.

We will not, in any other manner, interfere with, restrain, or coerce employees in the exercise of rights under Section 7 of the Act.

We will bargain in good faith with the aforesaid Union, upon its request, as the exclusive representative of the employees in the above-described bargaining unit and embody in a signed agreement any understandig reached.

We will offer to Michael Leone immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered by him by

reason of his discriminatory discharge.

Vegas Vic, Inc., d/b/a
Pioneer Club
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213-824-7351.

DECISION

Statement of the Case

Stanley Gilbert, Administrative Law Judge: Based upon a charge filed on August 6, 1973 as amended on September 26 and October 31, 1973, by Local Joint Executive Board of Las Vegas, Hotel and Restaurant Employees & Bartenders International Union, AFL-CIO, hereinafter referred to as the Union, the complaint herein was issued on October 31, 1973. The complaint

alleges that Vegas Vic, Inc., d/b/a Pioneer Club, hereinafter referred to as Respondent, engaged in various acts violative of Section 8(a)(1), (3), and (5) of the Act. Respondent, by its answer, denies that it engaged in conduct violative of the Act as alleged.[1]

Pursuant to notice, the hearing was held in Las Vegas, Nevada, on January 22, 23, 24 and 25, 1974, before me, duly designated as Administrative Law Judge. Appearances were entered on behalf of all the parties and briefs were received from the three said parties on April 1, 1974.

Upon the entire record in this proceeding and my observation of the witnesses as they testified, I make the following:

---

[1] Respondent raises five affirmative defenses. The first affirmative defense was dismissed on motion of Respondent. Its fourth affirmative defense, that the Union has engaged in conduct violative of the Act (unfairly representing employees) and should therefore be denied the protection of the Act, was ruled as an inappropriate defense to the issues raided by the complaint. The other affirmative defenses are considered hereinbelow.

Findings of Fact

I. Business of Respondent

Respondent, a Nevada corporation, maintains a facility in Las Vegas, Nevada, called the Pioneer Club where it is engaged in the operation of a gaming casino and bar. In the normal course and conduct of its business operation Respondent annually receives in excess of $500,000 in gross revenue, and purchases and receives goods and materials in excess of $50,000 originating from sources outside the State of Nevada.

As is admitted by the Respondent, it is now, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

As is admitted by the Respondent, the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Bargaining Unit Involved

The bargaining unit involved herein is as follows:

All employees including bartenders, waitresses, change girls, cashiers, porters and snack bar attendants, employed by Respondent, excluding office clerical employees, guards and supervisors as defined in the Act.

There is no dispute as to the above-described unit being an appropriate bargaining unit, however, as opposed to the General Counsel and the Union, the Respondent contends that the Union did not and does not represent the employees within the classification of change girls and cashiers.

B. Background Information

The Respondent operates a gambling casino which is limited solely to slot machines as contrasted to a casino which also has a "pit" in which there are gambling tables for such games as roulette, 21, and craps. For easy re reference, Respondent's type of operation will be referred to as a "slot house" as opposed to a casino.

Also, for ready reference is a list of the management personnel who are involved in this proceeding: Margaret Elardi (hereinafter referred to as Mrs. Elardi) is president and owner, hence a supervisor; Tommy Elhardi (hereinafter referred to as Elardi) is the son of Mrs. Elardi and general manager, hence a supervisor; Chuck Uhls is a manager, hence a supervisor; and V. E. Hamm and Raymond D. Bohart were Respondent's bargaining representa-

At the outset, it shoudl be stated that it is deemed necessary, in order to resolve the issues herein, to consider the record as a whole.

C. Respondent's Bargaining Relationship with the Union

As a framework for the consideration of the various incidents material to the resolutions of the issues herein, the history of the bargaining relationship between the Respondent and the Union is set forth hereinbelow.

The Union is composed of two local unions, Bartenders Union Local 165 and Culinary Workers Union Local 226. The Union (Charging Party) is the representative for collective bargaining and contract enforcement for said two locals.

On or about May 7, 1967, Mrs. Elardi became the owner of Respondent but did not, for a period thereafter, participate in the operations of Respondent. Apparently, at the time, Respondent was party to the "Casino Center Association" collective-bargaining agreement with the Union on an individual basis which agreement was by its terms effective from April 1, 1967 to April 1, 1970. At the time said agreement was signed by a representative of Respondent, a letter of understanding was executed which indicated that the Union and the employer had a dispute as to whether or not the change girls and cashiers were represented by the Union and covered by the agreement. Some time in May 1968 the dispute was resolved by a settlement agreement which provided, inter alia, that the Union was

entitled to represent the change girls and booth cashiers as part of the appropriate bargaining unit represented by the Union, that said classifications of employees were covered by the terms of the 1967-70 agreement and that contributions were to be made to the health and welfare fund provided for in said agreement on behalf of change girls and cashiers retroactive to January 1, 1968.

It appears that at about the same time the settlement was entered into the Respondent was closed down and that it was reopened after a couple of months (in or about July 1968) under the management of the Elardis. At that time also, it appears that the operation was converted from a casino to a slot house.

On or about May 13, 1970, the Respondent and Union negotiated a new contract. Apparently because of its status as a slot house Respondent's representatives indicated that they did not want to enter into a "casino agreement" (such as the '969-70 agreement) but rather a "bars only" contract, the type of contract which the Union entered into with the smaller Las Vegas establishments. Unlike the casino agreement, there were no job classifications in the bars only contract for cashiers and change girls. The parties entered into the bars only contract on May 13, 1970, by executing a "memorandum of understanding" which read as follows:

> It is agreed and understood by the parties signatory that employees of the Pioneer Club will suffer no loss of wages or reduction in benefits as a result of the Collective

Bargaining Agreement executed between the parties this date.

It is further understood and agreed that change girls and booth cashiers are included in the bargaining unit at the same wage rates as provided in the Agreement between the Local Joint Executive Board and the Nevada Resort Association.

The parties hereto also mutually agree that (a) the Pioneer Club will be bound by the terms of the 1970-73 Collective Bargaining Agreement for "bars only" and (b) if the Pioneer Club casino is reopened all of the terms and conditions of the Collective Bargaining and the Nevada Resort Association, representing downtown hotels and casinos, shall be immediately applicable to the Pioneer Club and the latter shall be considered legally signatory to the aforesaid Agreement.

There is uncontradicted testimony by Mrs. Elardi that she had an understanding with the Union that Respondent would only pay health and Welfare contributions for one cashier in each of the three shifts and for none of the change girls. It appears that contributions were made for the other classifications of employees in the bargaining unit. It further appears that by mid-1971 Respondent made health and welfare contributions for all employees in the above described bargaining unit including all the change girls and cashiers,

were made through June 1973.

According to Hamm's credited testimony the Elardis on several occasions in the period between January 1, 1973, and the expiration date of the 1970-73 agreement expressed a desire not to "be under any contract whatsoever" with the Union. On April 18, 1973, the Union sent a letter to Respondent notifying it that it wished to negotiate changes and modifications in the collective-bargaining agreement with the Respondent and requested a meeting for negotiations. On April 26, 1973, Respondent, through Hamm, notified the Union that it was Respondent's desire to terminate the collective-bargaining agreement effective at the expiration date of the agreement and stated its willingness to meet with the Union to discuss this decision. The only evidence in the record as to the reason for this notice by Respondent is testimony that when Elardi received the Union's request for negotiations he discussed with Hamm Respondent's desire to remove the cashiers and change girls from the existing union health insurance program and establish a new one and raised a question of whether the said two employee classifications were represented by the Union. It is noted at this point that parties stipulated that Respondents believed that the bartenders and cocktail waitresses were members of the Union and that the change girls and cashiers were not members of the Union.[2]

---

[2] There was no union-security clause in the contract; Nevada is a "right to work" state.

It appears that there was no further communication between the Respondent and the Union until some time in mid-July when a union representative made several calls requesting a meeting for negotiations which was arranged for July 25, 1973. The July 25 meeting was of short duration, lasting no longer than 5 or 10 minutes. While there is some disagreement among the witnesses as to what was stated at the meeting, it is found that Respondent's representative made it clear to the union representatives that the Respondent wanted an election before entering into negotiations with the Union, and that the union representative said he would have to check with his superior to determine the Union's position. There was no further communication between the two except for the filing of the original charge herein on August 6, 1973, and the subsequent filing of an RM petition by the Respondent on August 16, 1973.

D. The Issues

1. Whether the Union is, and has been at all times material herein, the collective-bargaining representative of Respondent's employees in the above-described bargaining unit.

2. Whether Respondent violated Section 8(a)(5) and (1) of the Act (a) unilaterally changing the operation of its sitdown bar to a service bar in April 1973;[3] (b) unilaterally changing its

---

[3] (See p. B-15.)

service bar back to a sitdown bar in July 1973; (c) soliciting employees to accept and unilaterally instituting a new health insurance plan for employees commencing the first few days in July 1973; and (d) insisting upon a representation election before negotiating with the Union on July 25, 1973.

3. Whether Respondent violated Section 8(a)(3) and (1) of the Act by (a) causing the constructive discharge of Fred Gomez on April 28, 1973, by its unilateral change of its sitdown bar to a service bar; and (b) discharging Michael Leone on July 19, 1973, because he refused to withdraw from the Union.

4. Whether Respondent, through Elardi violated Section 8(a)(1) of the Act by (a) soliciting employees to withdraw from their membership in the Union; (b) threatening employees with loss of employment if they did not do so; and (c) conditioning receipt of health insurance benefits by its employees on their withdrawal from union membership.

5. Whether Respondent, through Mrs. Elardi violated Section 8(a)(1) of the Act by

---

[3] A sitdown bar is one which has bar stools and/or cocktail tables at which customers can purchase drinks for cash. A service bar has no provision for the seating of customers and all drinks are served on a complimentary basis. Complimentary drinks are also taken care of by the bartender tending a sitdown bar.

(a) soliciting employees to withdraw their membership from the Union; (b) conditioning receipt of health insurance benefits by its employees on their doing so; and (c) threatening loss of bonuses paid to certain employees should the employees elect to have the Union represent them.

E. The Union's Majority Representation

Respondent asserts that the Union never was the majority representative of the above-described bargaining unit, that it was never the understanding between Respondent and the Union that the change girls and cashiers were included among the members of the bargaining unit represented by the Union. Thus, the Respondent contends, in effect, that, therefore, there can be no presumption of majority representation of a bargaining unit which includes the said two classifications of employees.[4]

There appears to be no merit to the Respondent's contention that it was not the understanding of the Respondent and the Union that the change girls and cashiers were in the bargaining unit. In the 1968 settlement agreement entered into between the Union and Respondent it was clearly stated that they were to be considered in the bargaining unit. Then, when the 1970-73 agreement was executed, there was a memorandum of understanding which clearly

---

[4] Said two classifications constitute a majority of the bargaining unit described hereinabove.

stated that "change girls and booth cashiers are included in the bargaining unit." The testimony o of Respondent's witnesses that this provision had only a limited purpose (which did not encompass the unambiguous statement that they were to be considered in the bargaining unit) is not persuasive. Said unambiguous language, coupled with the fact that just 2 years prior thereto there had been an agreement between the parties settling the dispute as to whether the change girls and booth cashiers were in the bargaining unit and the absence of any credible testimony to indicate that the Union had abandoned its position leads me to the conclusion that the parties understood that the change girls and booth cashiers were included in the bargaining unit and were covered by the 1967-70 and 1970-73 contract. This concusion is buttressed by the fact that from at least mid-1971 to the expiration of the 1970-73 agreement the Respondent made contributions to the Union's health and welfare fund on behalf of all employees including said two classifications of employees. The fact that the Respondent was not required to use the hiring halls available for the employment of change girls and booth cashiers is considered of little significance,[5] as is the fact that no grievances were filed by the Union on behalf of the change

---

[5] It appears that the Union did not strictly enforce provisions for hiring hall referrals for change girls and cashiers, and never required Respondent to use the hiring halls for said two classifications, even after the 1968 settlement agreement.

girls or cashiers. There is no showing that at any time a change girl or cashier brought a grievance to the Union.

Thus, it is concluded that it is appropriate to presume that at the expiration of the 1970-73 contract the Union represented a majority of the employees in the above-described bargaining unit. It is well established that a union's majority is presumed to continue after the expiration of its labor agreement and the employer is required to bargain with it unless there is competent evidence that it did not in fact represent the majority or the employer can demonstrate that it has a good-faith doubt of its majority representation. Celanese Corporation of America, 95 NLRB 664, 672; Automated Business Systems, 205 NLRB 532 (1973).

The record indicates that well before the expiration date of the contract the Respondent had resolved that it did not want to have any contract whatsoever with the Union.[6] While there is testimony that there were some complaints to Mrs. Elardi from employees during the previous

---

[6] In addition to Hamm's above-mentioned testimony that the Respondent expressed a desire not to be under any contract whatsoever, Linda McElwaine, who was employed at the end of March 1973 credibly testified that after she was hired by Uhls he asked her if she was "in the Union," and that, when she said she was not, he stated, "Well, that's good, because this is not a Union house."

year with respect to the payment of insurance claims under the union contract, said complaints furnish little basis for a finding that Respondent had a good-faith belief that a majority of the bargaining unit employees had become disenchanted with union representation. The only testimony of such disenchantment relates to events in the third week of July and first week in August. In the latter part of the third week in July 1973 two of the employees approached Elardi and one of them stated to him that she did not want to be covered by the Culinary Union and that a majority of the change girls and booth cashiers felt the same way. It appears that Elardi responded that he would "like to hear what the other girls have to say and then maybe we could do something about it." On or about August 2, 1973, Elardi was presented with a petition signed by 14 change girls and booth cashiers on July 31, 1973. The petition stated that "the undersigned no longer want to be covered by the Culinary Workers Local 226." It is noted, however, that almost immediately after the expiration of the contract on July 1, 1973, the Respondent offered employees and unilaterally instituted a private insurance plan (provided by the Prudential Insurance Company) as a substitute for the coverage under the union contract and solicited bartenders and cocktail waitresses to withdraw from the Union in order to obtain the new insurance. As set forth hereinbelow, this conduct constituted a violation of Section 8(a)(5) and (1) of the Act. On July 25, 1973, prior to receipt of the aforesaid employees' petition but subsequent to the commencement of the campaign to solicit employees to sign up for

the private insurance plan, Respondent's bargaining representative stated to the Union that it wanted an election before negotiating a contract with the Union. At the expiration of the contract Respondent had little objective basis for believing the majority of the employees in the bargaining unit did not want to be represented by the Union. It is reasonable to assume that thereafter Respondent effectively encouraged employees' disenchantment with having union representation by its solicitation of them to accept, and its unilateral institution of, the Prudential insurance plan.

Consequently, it is concluded that Respondent has failed to rebut the presumption that the Union enjoyed majority representation of the employees in the bargaining unit or to demonstrate that it had a good-faith doubt thereof on July 25, 1973, when it insisted on an election before beginning negotiations.

It is not clear whether Respondent seriously contends that the Union abandoned its position as collective-bargaining representative of the bargaining unit. Since there is testimony that Respondent so believed, this contention is considered. It appears that Respondent, prior to the expiration of the contract, wished to institute the private insurance program but was advised by its labor consultant to wait until after the contract had expired. Meanwhile, Respondent made union health and welfare contributions on behalf of all employees in the bargaiing unit through June 1973. The record discloses that Respondent started soliciting its employees to

accept coverage under the private insurance plan almost immediately after the contract expired and an explanation was offered that, since there had been no word from the Union by the beginning of July, it was assumed that the Union had abandoned representation of the employees. This, despite the fact that by letter dated April 16, 1973, the Union requested negotiations for modifications of the then existing contract. The fact that there was a delay until mid-July 1973 before the Union attempted to arrange a meeting for negotiations was no basis for finding that there was an abandonment.[7] In the circumstances of this case it appears that the Respondent did not, in good faith, believe that there was abandonment, but seized upon the fact that it had not been contacted by the Union as an excuse to undermine adherence to the Union by instituting the private insurance plan. Therefore, it is concluded that the Union had not abandoned its representation of the bargaining unit.

F. Changes in the Operation of the Bar

Without consulting the Union, Respondent changed the operations of its bar from that of a sitdown bar to that of a service bar on or about April 27, 1973. Then, on or about July 21, 1973, without consulting the Union, the Respondent

[7] A mere lack of communication from the Union does not suggest an intent on its part to abandon its representation of the employees. Brahaney Drilling Company, 209 NLRB 624 (1974).

reversed its policy and changed the operation of its service bar back to a sitdown bar. At a sitdown bar the bartender receives tips which is not true of a service bar. Thus the first change caused a loss of income to the bartenders thereby affecting the terms and conditions of their employment. It appears that bartender tips are part of their wage structure, for it is noted that, in the industry, service bartenders are generally given higher wages than sitdown bartenders receive. In Hilton Hotels Corporation, 191 NLRB 283, it was found that it was a violation of Section 8(a)(5) and (1) for an employer to reduce the amount of gratuity of its employees without giving their bargaining representative advance notice and an opportunity to negotiate over the contemplated change. Therefore, it is found that Respondent's action in changing its operations from a sitdown bar to a service bar without prior consultation with the Union constituted a violation of Section 8(a)(5) and (1) of the Act.

The General Counsel contends that the change in operations was motivated by an attempt to undermine the majority status of the Union. The record will not support such a finding. The change required a considerable capital expenditure for installing a new bar in a different part of the premises, and it appears that the sitdown bar was operated at a loss. Therefore, it is found that the change was made solely for economic reasons. It appears absurd, in the circumstances, that the Respondent made the change in order to undermine employees' adherence to the Union (by depriving bartenders of their tips). The fact that the change

was not discriminatorily motivated does not alter the requirement upon the part of the Respondent to consult the Union before making the change.

With respect to the reversion some 3 months later to a sitdown bar operation without prior consultation with the Union, it appears that at the most it was a technical violation of Section 8(a)(5) and (1) of the Act, since it did involve a change in the terms and conditions of employment of employees.[8] However, this change restored the opportunity for employees to receive tips and thereby increase their income, thus restoring the status enjoyed by employees prior to the first change. Consequently, it does not appear that any purpose would be served in finding that the restoration of the sitdown bar was violative of Section 8(a)(5) and (1) of the Act as alleged. As a remedy for the first change it will be recommended that the Respondent cease and desist from unilaterally changing the wages or other terms and conditions of employment of employees in the bargaining unit without prior consultation with the Union and make the bartenders whole for any loss of income they would have received during the period between the first and second change in the operation of the bar. Even if the second change were to be found to be violative of the Act, no further remedy could be recommended.

---

[8] The second change was prompted by customer complaints of a lack of seats for those who wished to lounge at the bar, particularly husbands waiting for wives playing the slot machines.

In arriving at the above conclusion that Respondent violated Section 8(a)(5) and (1) of the Act I have not failed to consider several defenses raised by Respondent. The first is that, even though the Union did not receive notice of the decision to change the sitdown bar to a service bar, it did have actual knowledge of the change after it was accomplished and acquiesced to it. In support of this, Respondent alludes to hearsay testimony of Elardi that two bartenders reported to him that they consulted the Union as to whether there should be a change in the wage rate because of the conversion to the service bar and were informed that no change in wage rate was required. This hearsay testimony is not considered to be probative evidence that the Union waived the right to bargain about the change in the bar operations.

A second defense is that the Union had knowledge of the change and took no action with respect thereto.[9] The claim of knowledge is predicated upon testimony that a union representative saw the bar operating as a service bar and that on at least one occasion the Respondent applied to the hiring hall for and received therefrom a "service bartender." These facts far from establish a clear and unmistakable waiver of the right to bargain with respect to the change in operation (which was a fait accompli). It is well established by proof that the subject matter was consciously explored and that it was clearly

---

[9] Until it filed its first amended charge herein on September 26, 1973.

and unmistakably waived. Century Electric Motor Co., 180 NLRB 1051, 1055.

Respondent also argues that the matter of the change in bar operations could have been made the subject of the grievance procedure under the contract and submitted to arbitration citing the "Collyer doctrine."[10] This contention is raised for the first time in Respondent's brief. Consequently, the record evidence is insufficient for a finding that a deferral is warranted. Nedco Construction Corp., 206 NLRB No. 17; International Association of Bridge, Structural and Ornamental Ironworkers Local Union No. 70, 206 NLRB No. 20. In any event, it does not appear that an issue raised by the General Counsel, that the change was motivated by a desire to undermine the Union, is one that could be considered in arbitration proceeding, since it would involve more than an interpretation of the contract.

G. Respondent's Insistence Upon an Election

As found hereinabove, Respondent's representative at the meeting on July 25, 1973, with union representatives indicated that the Respondent was not willing to enter into negotiations for a collective-bargaining agreement until after an election was held. In view of the findings hereinabove that at the expiration of the collective-

---

[10] Collyer Insulated Wire, 192 NLRB 837, 841-842 (1971).

bargaining agreement there is a presumption that the Union enjoyed a majority representation of the employees in the above-described bargaining unit, and further findings that said presumption was not rebutted and that the Respondent did not have a good-faith doubt of said majority representation, it follows that its refusal to bargain with the Union on July 25 without first having an election constituted an unlawful refusal to bargain within the meaning of Section 8(a)(5) and (1) of the Act. The record discloses that the Respondent had, even before the expiration of the collective-bargaining agreement, resolved not to enter into any contract with the Union, and by its solicitation of the change girls and cashiers to accept the private insurance plan and solicitation of the bartenders and cocktail waitresses to withdraw from the Union (ostensibly in order to obtain coverage under the private insurance plan) Respondent was attempting to undermine the Union and cause its defeat at the election which it sought.[11]

H. The Alleged Unlawful Constructive Discharge of Fred Gomez

Apparently the service bar was completed on April 27, 1973. Gomez worked for the first day at the service bar on April 28 and quit his employment at the end of the shift on that date. He testified that the reason he quit was that the

---

[11] Said solicitation of employees is set forth hereinbelow.

loss of tips (which he estimated to be between $7 to $10 a day) made it impossible for him to continue his employment.[12] The General Counsel contends that the change to a service bar was motivated by a desire on the part of the Respondent to rid itself of the bartenders (who were known to be union members). As stated hereinabove, the change to the service bar without prior consultation with the Union was violative of Section 8(a)(5) and (1) of the Act. Therefore, the issue with respect to whether the termination by Gomez of his employment on April 28 constituted an unlawful constructive discharge turns on a question of whether or not Gomez quit his employment because of the change in the terms and condition sof his employment.

The record discloses that for several months Bomez had been taking a course in refrigeration and intended to change to that field of employment. The record further discloses that about an hour before he decided to quit his employment he inquired of an employee of Dependable Appliance who was repairing an ice machine on Respondent's premises about employment with Dependable and was told whom to contact. He then called and arranged for an interview. It further appears that he started

---

12 It appears that it is more the area practice for service bartenders to be paid $3 to $4 more per day, ostensibly to compensate for lack of tips, and that Gomez was receiving $29 per day as a sitdown bartender.

his employment with said company 2 days later. Gomez testified that he knew that the area practice was for service bartenders to receive a higher salary than sitdown bartenders. It is noted, however, that he made no request of Respondent to make an adjustment for his loss of tips because of the change to a service bar, nor did he complain to the Union with respect thereto, but merely notified his supervisor Uhls that he was quitting because he "could no longer work under those conditions" and "could get a better job someplace else." It is concluded that the General Counsel has failed to prove by a preponderance of the evidence that Gomez quit his employment because of the change to a service bar. The fact that he had 9 months to go before concluding his course in refrigeration has not been overlooked, but he might very well have considered that the on-the-job training he would receive while being employed in the field would complement his study. His hasty decision to quit without first attempting to obtain an adjustment for the loss of his tips leads me to believe that he was motivated not by the change in the terms and conditions of his employment but rather by an opportunity to enter the field of employment in which he was interested. Thus, it will be recommended that the allegation that Respondent violated Section 8(a)(3) and (1) of the Act by causing the constructive discharge of Fred Gomez be dismissed.

I. The Discharge of Michael Leone

Leone was employed by Respondent toward the end of May 1973 as a service bartender th through the Union's hiring hall and was discharged on July 19, 1973. It is noted that after the expiration of the 1970-73 contract the Respondent ceased hiring bartenders through the hiring hall, but instead replaced the bartenders (who were male) with girls who were transferred from other job classifications.

Leone testified that he had a conversation with Elardi on or about July 1 or 2 in which Elardi asked him if he would "go non-Union to work as a bartender." Leone further testified as follows as to what then ensued in their conversation:

And I told him I wouldn't take a withdrawal from my Union.

And he said, "Okay. Look around for work, Mike, because within a few weeks I'm going to have to discharge you."

Q. And what did you say in response?

A. I told him to do what he had to do.

Q. Do you recall if anything else was said during that conversation?

A. He told me that he didn't want to fire me, and he asked me if he did go

back to Union if I would come back to work for him.

When Elardi was questioned as to this testimony, his testimony was as follows:

Now, at any time during Mr. Leone's employment did you ever inquire as to whether he had taken a withdrawal card?

A. Yes, I could have, right in the very first part of July.

Q. Okay. And do you remember having such a conversation?

A. I really don't recall it. If Mike was behind the bar, I talked with him because of the same situation I had with the Prudential insurance.

* * * * *

Q. Do you remember at any time saying to him that if he did not get a withdrawal card, he would lose his job?

A. No, I absolutely never said that.

It is noted that Elardi admitted that he talked to two bartenders about getting withdrawal cards from the Union. Uhls testified that he overheard part of the conversation between Leone and Elardi, that Elardi asked Leone "If he had his withdrawal card," and that he walked off when he "saw" what the conversation was about. While Uhls, when on the stand, could remember no more of the conversation, his pretrial affidavit

contains a statement that Elardi also said, "You know we're going non-Union and we might have to get rid of you."

Leone further testified that on July 19, 1973 1973, Elardi told him that Respondent was "definitely going nonunion," that it was his "last shift," that he was a good worker, and asked him if he would come back if Respondent "went union." Elardi testified that when he terminated Leone he told him that he was doing so because of dissatisfaction with the unclean way he kept the bar. Elardi further testified that he had two complaints from the porter about the way Leone kept the bar. It appears from the porter's testimony that, while he did make two complaints about Leone, his last complaint was made 3 or 4 weeks before Leone's discharge. Elardi testified that after the second complaint he warned Leone about keeping the bar clean. Leone denied this testimony.

Elardi further testified that shortly after the second complaint from the porter he received a complaint from Mary Jo Daniel, who objected to the way Leone left the bar. Mary Jo Daniel who worked 3 months as a bartender (starting about July 10, 1973) testified that Leone left the bar in a very unclean condition and that about the middle of July she complained to Elardi with regard thereto. Elardi admitted that he had never checked the bar himself and it appears that he never checked with Uhls, Leone's supervisor, for Uhls testified that Leone was a "good bartender," that he "seemed to get along with all the other employees," that he never

reprimanded him, and that he never talked to him about the "sloppiness of the bar."

As set forth hereinbelow, another witness, Sandra Daniel, credibly testified being threatened with loss of job if she did not obtain a withdrawal card from the Union. Leone was a convincing witness and, in the circumstances, particularly Uhl's good appraisal of Leone as a bartender, Elarki's failure to check personally on the condition of the bar, and the inference drawn from the record that the Respondent was attempting to use the device of a private insurance plan to undermine the Union, it is found that Leone's testimony should be credited.

Consequently, it is concluded that Leone was discriminatorily discharged in violation of Section 8(a)(3) and (1) of the Act, and that, while there may have been some basis for complaints about the way Leone kept the bar, said complaints were only a pretext for discharging him.

J. Soliciting Employees to Accept and Instituting a New Insurance Plan

As above stated, for at least 2 years prior to the expiration of the 1970-73 agreement all of the employees in the bargaining unit were covered under the union insurance plan for which Respondent made contributions. There is no dispute that immediately after the expiration of the contract the Respondent, through the Elardis, solicited the cocktail waitresses and

bartenders to obtain withdrawal cards from the Union upon the assertion that the Prudential Insurance Company wanted to avoid double coverage and solicited the change girls and cashiers to accept coverage under the Prudential plan. It appears that Respondent believed that the cocktail waitresses and bartenders were members of the Union and the change girls and cashiers were not. Since, as it has been found hereinabove, the Union continued to be the collective-bargaining representative of the employees in the bargaining unit, this action of bargaining directly with the employees with respect to their insurance coverage and unilaterally instituting a new insurance plan is violative of Section 8(a)(5) and (1) of the Act. The Board has held that dealing directly with employees about the terms and conditions of their employment without prior consultation with the union and refusing to negotiate with it constitutes a violation of Section 8(a)(5) and (1) of the Act. Chevron Oil Company, 168 NLRB 574. Also, it was a violation of Section 8(a)(1) of the Act to require, as a condition for receiving the benefit of the insurance plan, withdrawal from the Union.

K. Threatening Employees With Loss of Employment

As found above, Elardi threatened Leone with loss of his job if he did not obtain a withdrawal card from the Union. By his so doing, Respondent violated Section 8(a)(1) of the Act.

Sandra Daniel testified that, during the first week of July, Elardi told her that the

Prudential Insurance plan was being put into effect and that "in order to continue employment at the Pioneer Club" the employees "would be expected to take withdrawal cards" from the Union. She further testified that around the middle of July Elardi asked her whether she and the other cocktail waitresses had taken withdrawal cards from the Union and he stated that in order for them to be signed up under the Prudential Insurance plan they "had to show withdrawal cards," that Prudential would not cover members of the Union unless they had withdrawal cards. Daniel also testified to a conversation she had with Mrs. Elardi on July 3 in which Mrs. Elardi gave her an extension of a month before submitting her withdrawal card because she needed coverage for her son's dental work. Daniel testified to an additional conversation she had with Elardi at the beginning of August in which Elardi asked her if the cocktail waitresses had taken withdrawal cards yet, and stated that the time had come to make a decision, that they would have to take withdrawal cards or they would have to go.

Don Foulkrod testified that he was employed by the Respondent between July 3 and October 9, 1973, as a floorman, an admitted supervisory position. He credibly testified that he was present at a conversation between Elardi and Daniel (apparently the last one to which Daniel testified) in which Elardi asked Daniel is all the girls had withdrawals from the Union, that he thought he had allowed them enough time and said "you're going to have to get these withdrawals or I'm going to have to let you go."

Elardi denied that he had ever threatened to discharge an employee if he or she did not obtain a withdrawal card from the Union.

Daniel was a convincing witness and, in addition, her testimony is supported in part by Foulkrod. Therefore, her above testimony is credited and it is concluded therefrom that Respondent violated Section 8(a)(1) of the Act by threatening her with discharge if she did not obtain a withdrawal card from the Union. Although other witnesses testified they were not threatened with loss of job if they did not obtain withdrawal cards and one testified that she is still a member of the Union and is covered by the Prudential plan, I am not of the opinion that this evidence is sufficient to discredit the convincing testimony of Leone and Daniel.

L. Threat to Eliminate Bonuses

It appears that the Respondent gave bonuses to the change girls based upon the amount of "cans of nickles" they sold.

Linda McElwaine, who at the time of the hearing was still employed by Respondent, testified that in the first week of October 1973 Mrs. Elardi made a statement to her and Dorothy Walker, another employee, that it was up to the employees to determine whether they wanted the Union to represent them but that if they did, "she would have to cut out the bonuses."

Dorothy Walker testified that it was she (Walker) who made the statement that the

employees would lose their bonuses if they elected to have the union represent them. Mrs. Elardi testified that after Walker said that the employees would be "losing their bonuses" she (Mrs. Elardi) made a "comment" that it would probably save her between $200 and $300 a month.

McElwaine also testified that about a week later Mrs. Elardi said that "she gave out several hundred dollars extra each paycheck to the change girls as bonuses, and that if we did go Union she would just have to cut it out." Mrs. Elardi testified that she could not remember having any conversation with McElwaine about the Union other than the first one above-mentioned.

Even if Mrs. Elardi's and Walker's testimony about the first conversation were to be credited (that it was Walker who made the comment about losing the bonuses), nevertheless, Mrs. Elardi's further testimony that she said she would save between $200 and $300 a month makes it clear that she adopted Walker's statement. Consequently, she, in effect, did threaten to eliminate the bonuses if the employees elected to be represented by the Union.

In any event, McElwaine was a convincing witness and her testimony as to the two incidents is credited. Therefore, it is concluded that Respondent did unlawfully threaten to eliminate bonuses for the change girls if the employees elected to be represented by the Union and did thereby violate Section 8(a)(1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The unfair labor practices of the Respondent set forth in section III, above, occurring in connection with its operations set forth in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

It will be recommended that the Respondent be ordered to cease and desist from engaging in the unfair labor practices found herein and take certain affirmative action, as provided in the recommended Order below, designed to effectuate the policies of the Act.

In view of the conclusions stated hereinabove, an order is warranted herein requiring Respondent to bargain with the Union as the exclusive representative of the appropriate bargaining unit described hereinabove. Therefore, it will be recommended that Respondent bargain with said Union with respect to the above-described bargaining unit upon the Union's request and embody in a signed agreement any understanding reached.

It having been found that Michael Leone was unlawfully discharged on July 19, 1975, it will be recommended that Respondent be ordered to offer him immediate and full reinstatement to his

former job, or, if his job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges. It will be further recommended that Respondent be ordered to reimburse him for any loss of pay he may have suffered as a result of its discriminatory action against him in the manner set forth in F. W. Woolworth Company, 90 NLRB 289, 291-293 (1950), together with 6-percent interest thereon in accordance with Isis Plumbing & Heating Co., 138 NLRB 716 (1963).

It having been found that Respondent violated Section 8(a)(5) and (1) of the Act by converting its sitdown bar to a service bar from the period between April 27 to July 21, 1973, it will be recommended that the Respondent be ordered to make the bartenders employed during that period whole for any loss of tips they would have received had the bar remained a sitdown bar.

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding, I make the following:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and has been at all times material herein, the collective-bargaining representative of Respondent's employees in the appropriate bargaining unit described as follows:

> All employees including bartenders, waitresses, change girls, cashiers, porters and snack bar attendants, excluding office clerical employees, guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(5) and (1) of the Act by (a) unilaterally changing its bar operation from that of a sitdown bar to a service bar in April 1973; (b) insisting upon a representation election before negotiating with the Union on July 25, 1973; (c) bargaining directly with the employees by soliciting them to accept and instituting a new insurance plan.

5. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Michael Leone on July 19, 1973, because of his adherence to the Union.

6. Respondent violated Section 8(a)(1) of the Act by (a) soliciting employees to withdraw their membership from the Union; (b) threatening employees with loss of employment if they did not do so; (c) conditioning receipt of health insurance benefits by employees on their withdrawal from membership; and (d) threatening loss of bonuses paid to certain of the employees should the employees elect to have the Union represent them.

t. General Counsel has failed to prove by a preponderance of the evidence the allegations in the complaint that Respondent unlawfully caused the constructive discharge of Fred Gomez on April 28, 1973.

Upon the foregoing findings of fact, conclusions of law and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[13]

Respondent, Vegas Vic, Inc., d/b/a Pioneer Club, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with the Union as the collective-bargaining representative of the employees in the above-described bargaining unit.

(b) Effecting changes in the wages, terms, or conditions of employment of employees in the

---

[13] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

above-described bargaining unit without prior consultation with the Union.

(c) Bargaining directly with employees with respect to their wages or terms and conditions of their employment.

(d) Discouraging membership in the Union by discriminating in regard to hire or tenure of employment or any term or condition thereof.

(e) Soliciting employees to withdraw their membership from the Union.

(f) Threatening employees with loss of employment if they do not withdraw their membership from the Union.

(g) Conditioning receipt of health insurance benefits by its employees on their withdrawal from Union membership.

(h) Threatening loss of bonuses paid to certain employees should the employees elect to have the Union represent them.

(i) In any other manner interfering with, restraining or coercing employees in the exercise of rights under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Bargain in good faith with the aforesaid Union, upon its request, as the exclusive representative of the employees in the above-described appropriate bargaining unit; and embody in a signed agreement any understanding reached.

(b) Offer to Michael Leone immediate and full reinstatement to his former job, or, if his job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any

loss of pay suffered by him by reason of his discriminatory discharge in the manner set forth in the section hereinabove entitled "The Remedy."

(c) Make the bartenders who were employed during the period from April 27 to July 21, 1973, whole for any loss of tips they would have received had the Respondent continued to operate its bar as a sitdown bar.

(d) Upon request, make available to the Board or its agents, for examination and copying, all payroll and other records containing information concerning its backpay obligation under this recommended Order.

(e) Post at its place of business in Las Vegas, Nevada, copies of the attached notice marked "Appendix"[14] Copies of said notice, on forms to be furnished by the Regional Director for Region 31, shall, after being duly signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

---

[14] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

It is further ordered that the allegations in the complaint that Respondent discriminated against Fred Gomez by constructively discharging him be, and are hereby, dismissed.

APPENDIX C

FILED
NOV 23, 1976
EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. VEGAS VIC, INC. d/b/a PIONEER CLUB, Respondent.	No. 74-3278 OPINION

On Application for Enforcement of an Order of The National Labor Relations Board

Before: CARTER, WRIGHT and WALLACE, Circuit Judges.

WRIGHT, Circuit Judge:

The Board's order, reported at 213 NLRB No. 116, should be enforced. It is well settled that there must be substantial evidence on the

record as a whole to support the Board's findings and that the trial examiner has the responsibility of evaluating the credibility of the witnesses and the weight to be given their testimony. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); NLRB v. Tri-State Stores, Inc., 477 F.2d 204, 206 (9th Cir. 1972), cert. denied 414 U.S. 1130 (1974).

Here substantial evidence on the record as a whole supports the Board's findings that the employer violated the Labor Relations Act by (1) insisting upon a representation election before bargaining with the union, (2) bargaining directly with employees, and (3) unilaterally instituting a new insurance plan.

An incumbent union's majority status is presumed to continue after expiration of an employer-union agreement. Terrell Machine Co. v. NLRB, 427 F.2d 1088, 1090 (4th Cir.), cert. denied 398 U.S. 929 (1970). To overcome the presumption, the employer must show that the union no longer had majority support or that his refusal to bargain was predicated upon a reasonably grounded good faith doubt of majority support. Id. at 1090.

In approaching the question of good faith doubt we note that the Board has adopted an objective approach* and has recently stated: "[T]he standard of serious doubt as employed by the courts is no

* See Wanda Petroleum, 217 NLRB No. 62 (April 11, 1975).

more or lessthat the standard the Board sets out when it states that 'reasonably based doubt' must be based on 'objective considerations' . . . ." Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n, 213 NLRB No. 74, 87 LRRM 1194, 1197 (1974).

In following the objective approach, however, we recognize that subjective intent may be considered insofar as it is discerned from objective evidence. As stated in Orion Corporation v. NLRB, 515 F.2d 81, 85 (7th Cir. 1975), "The 'good faith doubt' must satisfy an objective test, although subjective evidence may be used to bolster the argument that such doubt existed at the relevant time."

In a withdrawal of recognition case, the employer bears the burden of proving the union's loss of majority and the presumption of majority must be rebutted by clear, cogent, and convincing evidence. NLRB v. Tragniew, 470 F.2d 669, 674-75 (9th Cir. 1972). This the employer failed to do.

The fact that 14 of 24 members of the bargaining unit were not members of the union does not mean that the union did not have their support. Terrell, 427 F.2d at 1090; Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 490 (2d Cir. 1975). Facts cited by the employer in defense of its withdrawal of recognition are either not supported by the record, refuted by its own actions and 25-year bargaining history, or are the type of "speculative and subjective" information specifically rejected in Orion Corp. v. NLRB, 515 F.2d 81, 85 (7th Cir. 1975).

The Board's order will be enforced.

APPENDIX D

FILED
FEB 2, 1977
EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	
vs.	)	No. 74-3278
	)	OPINION
VEGAS VIC, INC. d/b/a PIONEER CLUB,	)	
Respondent.	)	

Before: CARTER, WRIGHT and WALLACE, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Wallace have voted to reject the en banc suggestion.

The full court has been advised of the suggestion for a rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. p. 35(b).

The panel has also voted to amend the slip opinion filed on November 23, 1976 by deleting the third complete paragraph on page 2 of the slip opinion, and substituting the following:

Vegas Vic contends that it established that it entertained a bona fide doubt as to the union's majority status which should have been sufficient to shift the burden of proof to the general counsel for the Board to come forward with evidence to establish the union's continuing majority. The factors upon which it relies, however, are insufficient to convince us that the Board's conclusions are not supported by substantial evidence.

DATE: January 28, 1977.

APPENDIX E

FILED
FEB 28, 1977
EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	
vs.	)	No. 74-3278
VEGAS VIC, INC. d/b/a PIONEER CLUB,	)	
Respondent.	)	

JUDGMENT

Before: CARTER, WRIGHT and WALLACE, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Vegas Vic, Inc., d/b/a Pioneer Club, Las Vegas, Nevada, its officers, agents, successors, and assigns on October 4, 1974. The Court heard argument of respective counsel on October 6, 1976, and has considered the briefs transcript of record filed in this cause. On November 23, 1976, the Court, being fully advised in the premises handed down its opinion

granting enforcement of the Board's order. In comformity therewith, it is hereby,

ORDERED AND ADJUDGED by the Court that Respondent, Vegas Vic, Inc., d/b/a Pioneer Club, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with the Local Joint Executive Board of Las Vegas, Hotel and Restaurant Employees & Bartenders International Union, AFL-CIO (hereinafter called the Union) as the collective-bargaining representative of the employees in the bargaining unit described in the Administrative Law Judge's Decision.

(b) Effecting changes in the insurance plan of employees in the bargaining unit described in the Administrative Law Judge's Decision without prior consultation with the Union.

(c) Bargaining directly with employees with respect to their wages or terms and conditions of their employment.

(d) Discouraging membership in the Union by discriminating in regard to hire or tenure of employment or any term or condition thereof.

(e) Soliciting employees to withdraw their membership from the Union.

(f) Threatening employees with loss of employment if they do not withdraw their membership from the Union.

(g) Conditioning receipt of health insurance benefits by its employees on their withdrawal from Union membership.

(h) Threatening loss of bonuses paid to certain employees should the employees elect to have the Union represent them.

(i) In any other manner interfering with, restraining or coercing employees in the exercise of rights under Section 7 of the National Labor Relations Act. (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Bargain in good faith with the aforesaid Union, upon its request, as the exclusive representative of the employees in the appropriate bargaining unit; and embody in a signed agreement any understanding reached.

(b) Offer to Michael Leone immediate and full reinstatement to his former job, or, if his job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered by him by reason of his discriminatory discharge in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy." (Attached hereto as Appendix A.)

(c) Upon request, make available to the Board or its agents for examination and copying all payroll and other records containing information concerning its backpay obligation under this Judgment.

(d) Post at its place of business in Las Vegas, Nevada, copies of the notice attached hereto and marked "Appendix B." Copies of said notice on forms to be furnished by the Regional Director for Region 31, (Los Angeles,

California) shall, after being duly signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof and maintained by it for a period of at least 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps Respondent has taken to comply herewith, with costs in this court in favor of the Petitioner and against the Respondent. Costs.

REPRODUCTION OF RECORD ... $ 54.25
BRIEFS OF NLRB 304.00
$358.25 TOTAL

SO ORDERED

/s/ Emil E. Melfi
Emil E. Melfi
Clerk

/s/ James M. Carter,
James M. Carter, Circuit Judge

/s/ Eugene A. Wright
Eugene A. Wright, Circuit Judge

/s/ J. Clifford Wallace
J. Clifford Wallace, Circuit Judge

/A TRUE COPY
Ebruary 28, 1977
ATTEST:
Emil E. Melfi
Clerk/
by: /s/ Bruce Cutler
Bruce Cutler, Deputy Clerk

APPENDIX A

V. The Remedy

It will be recommended that the Respondent be ordered to cease and desist from engaging in the unfair labor practices found herein and take certain affirmative action, as provided in the recommended Order below, designed to effectuate the policies of the Act.

In view of the conclusions stated hereinabove, an order is warranted herein requiring Respondent to bargain with the Union as the exclusive representative of the appropriate bargaining unit described hereinabove. Therefore, it will be recommended that Respondent bargain with said Union with respect to the above-described bargaining unit upon the Union's request and embody in a signed agreement any understanding reached.

It having been found that Michael Leone was unlawfully discharged on July 19, 1973, it will be recommended that Respondent be ordered to offer him immediate and full reinstatement to his former job, or, if his job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges. It will be further recommended that Respondent be ordered to reimburse him for any loss of pay he may have suffered as a result of its discriminatory action against him in the manner set forth in F. W. Woolworth Company, 90 NLRB 289, 291-293, together with 6 percent interest thereon in accordance with Isis Plumbing & Heating Co., 138 NLRB 716.

It having been found that Respondent violated Section 8(a) (5) and (1) of the Act by converting its sit down bar to a service bar from the period between April 27, 1973 to July 21, 1973, it will

be recommended that the Respondent be ordered to make the bartenders employed during that period whole for any loss of tips they would have received had the bar remained a sit down bar.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT refuse to bargain in good faith with the Local Joint Executive Board of Las Vegas, Hotel and Restaurant Employees & Bartenders International Union, AFL-CIO, as the collective-bargaining representative of the employees in the following bargaining unit:

All employees, including bartenders, waitresses, change girls, cashiers, porters and snack bar attendants, excluding office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT effect changes in the insurance plan of employees in the above-described bargaining unit without prior consultation with the aforesaid Union.

WE WILL NOT bargain directly with employees with respect to their wages or terms and conditions of their employment.

WE WILL NOT discourage membership in the aforesaid Union by discriminating in regard to hire or tenure of employment or terms or conditions thereof.

WE WILL NOT solicit employees to withdraw their membership from the aforesaid Union or threaten employees with loss of employment if they do not do so.

WE WILL NOT condition receipt of health insurance benefits of employees on their withdrawal from membership in the aforesaid Union.

WE WILL NOT threaten loss of bonuses paid to certain of our employees should they elect to have the aforesaid Union represent them.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce employees in the exercise of rights under Section 7 of the Act.

WE WILL bargain in good faith with the aforesaid Union, upon its request, as the exclusive representative of the employees in the above-described bargaining unit and embody in a signed agreement any understanding reached.

WE WILL offer to Michael Leone immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered by him by reason of his discriminatory discharge.

VEGAS VIC, INC., d/b/a PIONEER CLUB
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213-824-7351.

APPENDIX F

NATIONAL LABOR RELATIONS BOARD

REGION 31
(Seal)
11000 Wilshire Boulevard, 12th Floor

Los Angeles, California 90024

Telephone (213) 824-7357

March 3, 1977

Brian L. Rexon, Esquire
Nelson, Kirshman, Goldstein, Gentile & Rexon
1801 Century Park East, Suite 2400
Los Angeles, CA 90067

Re: Vegas Vic, Inc.
d/b/a Pioneer Club
Case No. 31-CA-3897

Dear Mr. Rexon:

You have recently received the Judgment of the Court of Appeals in the above case. Pursuant thereto, Respondent is required to notify me within 10 days of the receipt of that document what steps it has taken or will take to comply. If you or Respondent have any questions, please write or telephone Compliance Officer Robert Arey who will assist Respondent in effecting compliance.

Attached to Respondent's copy of this letter are copies of the Notice Respondent will need in order to comply with the terms of the Judgment. Respondent should sign and date these, post an appropriate number, and return four (4) signed and dated copies, within 10 days, with a

covering letter stating exactly when and where Respondent posted other copies.

The Judgment provides that the Employer will offer reinstatement to Michael Leone. Will you or Respondent kindly furnish us with a copy of such such reinstatement offer within 10 days and advise us what action he has taken in response thereto. For your convenience Michael Leone's last known address is 1702 Division, Boise, Idaho 83706.

The Judgment in this case provides that the Employer will bargain collectively, upon request, with the Union. This office must make a determination at a future time as to whether or not there has been compliance with the Judgment. To assist us in making this determination, the parties are requested to:

1. Send this office copies of all correspondence with the other party;

2. Furnish this office with copies of all written contract proposals and counterproposals;

3. Inform the undersigned from time to time, in writing or orally, as to the progress of negotiations.

Respondent is herein requested to compile and make available to the Board Agent assigned, with within 10 days, all payroll records, Social Security records, timecards, personnel records and reports, and all other records necessary for determination of the amount of backpay due under the terms of the Judgment. Such records should include the records of Michael Leone as well as the records of employees in Michael Leone's classification who worked for Respondent during

the backpay period.

The Remedy section of the Judgment provides t that the Respondent make the bartenders employed during the period between April 27, 1973, whole for any loss of tips they would have received had the sit down bar not been converted to a service bar. Respondent is herein requested to compile and make available to the Board Agent assigned, within 10 days, all payroll records, Social Security records, timecards, personnel records and reports, and all other records necessary for determination of the amount of backpay due under the terms of the Judgment. Such records should include the records of all the bartenders employed during the period referred to above.

At the end of the posting period you or Respondent should advise me that the Notices were continuously and conspicuously posted. If and when Respondent has fully complied with the affirmative terms of the Judgment and there are no reported violations of its negative provisions, we shall notify you that the cas has been "closed" on compliance.

Very truly yours,

Abraham Siegel
Regional Director

Enclosure

cc: Vegas Vic, Inc., d/b/a Pioneer Club, 25 East Fremont, Las Vegas, NV 89101,
Encl.: 10 Notices

Philip Paul Bowe, Esquire, Davis, Cowell & Bowe, 351 California Street, Suite 420, San Francisco, CA 94104, Encl.: Notice

Local Joint Executive Board of Las Vegas, P. O. Box 14396, Las Vegas, NV 89114, Encl.: Notice

Supreme Court, U. S.
FILED
JUN 23 1977
MICHAEL RODAK, JR., CLERK

No. 76-1460

In the Supreme Court of the United States

OCTOBER TERM, 1976

VEGAS VIC, INC., D/B/A PIONEER CLUB, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ANNE E. LIBBIN,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1460

VEGAS VIC, INC., D/B/A PIONEER CLUB, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3) is reported at 546 F. 2d 828. The decision and order of the National Labor Relations Board (Pet. App. B-1 to B-43) are reported at 213 NLRB 841.

JURISDICTION

On January 28, 1977, the court of appeals entered an order denying a petition for rehearing and amending its earlier opinion (Pet. App. D-1). The judgment of the court of appeals was filed on February 28, 1977 (Pet. App. E-1). The petition for a writ of certiorari was filed on April 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner's refusal to bargain with a union was not based on a reasonably grounded good faith doubt that the union continued to represent a majority of its employees.[1]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 4-6.

STATEMENT

1. Petitioner operates a gambling establishment in Las Vegas, Nevada, commonly known as a "slot house" because it has only slot machines and not gambling tables (Pet. App. B-8 to B-9). Since the late 1940's, the same local union has represented petitioner's employees.[2] The most recent collective bargaining agreement between the union and petitioner was a "memorandum of understanding" dated May 13, 1970, binding petitioner to the terms of the union's 1970-1973 "bars only" collective bargaining agreement (Pet. App. B-9, B-11 to B-12), and including petitioner's change girls and booth cashiers in the bargaining unit at wage rates provided in the union's agreement with the Nevada Resort

[1]In a letter to the Clerk of this Court, dated May 2, 1977, petitioner advised that, in view of the withdrawal of the Board's inadvertent request for compliance with a provision that had not been adopted by either the Board or the court of appeals, question three in the petition (Pet. 3), discussed at Pet. 19-21, "has become moot."

[2]Local Joint Executive Board of Las Vegas, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, composed of Bartenders Union, Local 165 and Culinary Workers, Local 226 (Pet. App. B-6, B-10).

Association (Pet. App. B-12).[3] From at least mid-1971 until the July 1, 1973 expiration date of the 1970-1973 contract, petitioner made payments to the union's health and welfare fund on behalf of all its unit employees, including change girls and booth cashiers (Pet. App. B-12 to B-13, B-17, B-19).

On April 18, 1973, the union requested a meeting with petitioner to negotiate changes in the collective bargaining agreement (Pet. App. B-13). On April 26, 1973, petitioner responded that it desired to terminate the agreement. On several occasions between January 1, 1973 and July 1, 1973, petitioner expressed a desire not to have any contract whatsoever with the union (Pet. App. B-13, B-18 and n. 6), and shortly after the expiration of the contract petitioner unilaterally instituted a private insurance plan and solicited employees to withdraw from the union in order to obtain the new insurance (Pet. App. B-19). During the first week of July, petitioner threatened employees Sandra Daniel and Michael Leone with loss of their jobs if they did not obtain union withdrawal cards; and, on July 19, petitioner discharged Leone (Pet. App. B-29 to B-32, B-33 to B-35). On July 25, 1973, at a meeting arranged by a union representative, petitioner refused to enter into negotiations until a new election was held (Pet. App. B-14).

2. Based upon these facts, the Board, adopting the decision of the Administrative Law Judge in all respects here relevant,[4] held that petitioner had violated Section 8(a)(1),

[3]In May 1968, petitioner and the union reached a settlement agreement that provided that the change girls and booth cashiers would be included in the bargaining unit represented by the union and would be covered by the terms of the 1967-1970 collective bargaining agreement between the union and petitioner (Pet. App. B-10 to B-11).

[4]The Board did reject the Administrative Law Judge's finding that petitioner's April 1973 unilateral change from a sit-down to a service bar was unlawful (Pet. App. B-2 to B-3).

(3), and (5) of the Act, 29 U.S.C. 158(a)(1), (3), and (5), by soliciting employees to withdraw from union membership, discharging employee Michael Leone because of his union adherence, unilaterally instituting a new insurance plan and soliciting employees to accept it, and insisting upon a representation election before negotiating with the union (Pet. App. B-1 to B-3, B-39).

The Board rejected contentions urged by petitioner to justify its refusal to bargain. Petitioners claimed that the union was never the majority representative since there was no agreement to include change girls and booth cashiers in the bargaining unit. The Board, however, noted that both the 1968 settlement agreement and the memorandum of understanding executed with the 1970-1973 agreement clearly stated that "change girls and booth cashiers are included in the bargaining unit" (Pet. App. B-16 to B-17). The Board further found that employee complaints regarding payment of insurance claims under the union's health and welfare plan did not furnish an adequate basis for a good faith belief that a majority of the employees was disenchanted with the union representation, and that employee statements and a petition indicating that they no longer desired to be "covered by" the union resulted from petitioner's unlawful encouragement of employee disenchantment (Pet. App. B-18 to B-20). Finally, the Board found that petitioner did not, in good faith, believe that the union had abandoned the unit, but seized upon the union's delay (from April 18 until mid-July 1973) in arranging a meeting for negotiations as an excuse to undermine the union by instituting the private insurance plan (Pet. App. B-20 to B-21).

Accordingly, the Board concluded that petitioner's refusal to bargain on July 25, 1973, without an election, was unlawful (Pet. App. B-26), and ordered petitioner to bargain with the union (Pet. App. B-39 to B-41).

3. The court of appeals enforced the Board's order, holding that substantial evidence on the record as a whole supported the Board's conclusions (Pet. App. A-1 to A-3), and that petitioner had not shown that its refusal to bargain was predicated on a reasonably grounded good faith doubt of the union's majority status (Pet. App. A-2 to A-3). The court found that the factors on which petitioner relied to support its alleged doubt were "either not supported by the record, refuted by its own actions and 25-year bargaining history, or are the type of 'speculative and subjective' information specifically rejected in *Orion Corp.* v. *NLRB*, 515 F. 2d 81, 85 (7th Cir. 1975)" (Pet. App. A-3).

ARGUMENT

The sole question presented is whether there is substantial evidence to support the Board's finding that petitioner, in refusing to bargain with the union, was not motivated by a reasonably based good faith doubt concerning the union's majority status.[6] Resolution of that issue turns solely upon the application of settled law to the particular facts of this case. Consequently, further review is not warranted. See *Universal Camera Corp.* v. *National Labor Relations Board*, 349 U.S. 474, 487.

---

[6]It is settled that an incumbent union, whether or not certified by the Board, enjoys a presumption of majority status. *E.g.*, *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 104; *Terrell Machine Co.* v. *National Labor Relations Board*, 427 F. 2d 1088, 1090 (C.A. 4), certiorari denied, 398 U.S. 929. This presumption can be rebutted by evidence showing that the union has lost the support of a majority of the employees in the particular unit or by evidence that the employer had a reasonable good faith doubt of continued majority status at the time it withdrew recognition. *E.g.*, *National Labor Relations Board* v. *Crimptex, Inc.*, 517 F. 2d 501, 503 (C.A. 1); *National Labor Relations Board* v. *Gulfmont Hotel Co.*, 362 F. 2d 588, 589 (C.A. 5).

In any event, the record amply supports the Board's finding. As noted, the union has represented petitioner's employees for more than 25 years. Prior to petitioner's refusal to negotiate with the union, petitioner had expressed a desire not to be under any union contract, and had solicited employees to withdraw from the union and to accept coverage under the insurance plan that it had instituted immediately upon expiration of the 1970-1973 collective bargaining agreement. These circumstances, plus the fact that the company discharged employee Leone because of his refusal to withdraw from the union,[7] fully support the Board's finding that petitioner's refusal to bargain was not motivated by a good faith doubt concerning the union's majority status.

There is no merit to petitioner's contention (Pet. 14-18) that it was required to present "clear, cogent and convincing evidence of either loss of a union's majority or good faith doubt of majority status," whereas the Board's General Counsel was permitted "to prove majority status, either by a preponderance of the evidence or by way of presumption." The amended court opinion deletes the phrase "clear, cogent, and convincing evidence" (Pet. App. C-3), and concludes instead that the factors upon which petitioner relies to establish that it entertained a bona fide doubt as to the union's majority status "are insufficient to convince us that the Board's conclusions are not supported by substantial evidence" (Pet. App. D-2).[8]

---

[7] Petitioner does not here challenge the Board's finding respecting Leone, which was sustained by the court below.

[8] *Orion Corporation* v. *National Labor Relations Board*, 515 F. 2d 81 (C.A. 7), and *Retired Persons Pharmacy* v. *National Labor Relations Board*, 519 F. 2d 486 (C.A. 2), cited by the court below (Pet. App. C-3), are not to the contrary. In *Orion*, the court, after stating that an employer's good faith doubt "must satisfy an objective test, although subjective evidence may be used to bolster the argument that such doubt existed at the relevant time," went on to find that the Board's conclusion that the company failed to meet this test "was supported by substantial evidence" (515 F. 2d at 85). Similarly, in *Retired Persons*, the court merely held that the fact that "eight of 28 employees do not support the union" does not provide "objective grounds" for believing "the majority's preference has changed, particularly when ten employees voted against the union from the very start" (519 F. 2d at 490).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ANNE E. LIBBIN,
Attorney,
National Labor Relations Board.

JUNE 1977.

DOJ-1977-06